84-895

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL EVANS,

Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

1. Did the courts below deny the defendant Michael Evans due process of law by convicting him where the evidence offered at trial by the state failed to prove Evans' guilt beyond a reasonable doubt?

2. Did the trial court abuse its discretion in sentencing the defendant to a specific period of incarceration in the form of straight time and periodic imprisonment where the imposition of the maximum probationary period of thirty months alone would have served the State's objectives just as well.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

MICHAEL EVANS,	)
	)
Petitioner,	)
	)
vs.	)
	)
PEOPLE OF THE STATE OF ILLINOIS,	)
	)
Respondent.	)

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

REVIEW OF PROCEEDINGS BELOW

Upon convicting Michael Evans on three counts of reckless homicide, the trial court sentenced Evans to thirty months' probation, with the first six months to be served with the Cook County Department of Corrections and last ninety days to be served by periodic imprisonment on weekends. (App., p. 35-38).

Evans filed a timely appeal, and the Appellate Court of Illinois, First Judicial District, affirmed the conviction of reckless homicide but remanded the case for resentencing. The court held that the trial court erred in sentencing Evans to six months incarceration in addition to the term of periodic imprisonment. The Unified Code of Corrections, Ill. Rev. Stat. ch. 38 par. 1005-7-1(c) (1981), specifically precludes the sentence of six months straight time and periodic imprisonment as conditions for a probationary sentence. (App., p.2-3-4).

Defendant filed a petition for leave to appeal to the Illinois Supreme Court, which was denied on October 2, 1984.

JURISDICTIONAL STATEMENT

Michael Evans was found guilty on three counts of reckless homicide by the Circuit Court of Cook County, Illinois, on September 22, 1982. On May 8, 1984, the Appellate Court of Illinois, First Judicial District, affirmed Evans' conviction, but remanded for resentencing because the Illinois statute, Ill. Rev. Stat. ch. 38, par. 1005 -7-1(c) (1981), precluded a sentence of straight time and periodic imprisonment as conditions of probation. A petition for rehearing to that court was denied June 8, 1984. A timely petition for leave to appeal to the Illinois Supreme Court was filed on July 13, 1984, and denied on October 2, 1984.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV to the Constitution of the United States:

Section 1.

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The defendant, Michael Evans, was charged with reckless homicide arising out of a collision between an automobile driven by John Best and another automobile in Calumet City, Illinois. The defendant's car was not involved in the

accident. Two of the passengers in Best's auto were killed - fifteen year old Patricia Koerner and eighteen year old Ronald Gibbs. The driver of the car Best collided with, forty-two year old Sherry Kasee, was also killed. (R. 18, 24, 28).

At the time of his trial, Michael Evans was seventeen years old (R. 393). According to his testimony at trial, both he and Best were carrying three passengers in their respective vehicles on the evening of the accident. (R. 410, 432). The two cars stopped at Best's house to get some oil for Evans' car. (R. 406). Evans and Best then proceeded to drive from Indiana, where Best resided, into Illinois, where Evans resided, eventually reaching the intersection of Torrence

Avenue and 159th Street in Calumet City, heading north. (R. 410). During this drive, Best was nearly always following Evans' automobile, as Best was unfamiliar with the streets in Illinois. (R. 427-428, 433-434). Upon their arrival at the intersection, the teenagers were planning to stop at a nearby McDonald's Restaurant and then go to the home of one of Evans' passengers. (R. 432, 434).

When the two cars arrived at the intersection, a van driven by Catherine Campbell was waiting there for a red light. Evans pulled up to the left side of the van and Best, who had been following Evans, pulled up on the right of Campbell's van. The lanes occupied by Evans and Campbell were both intended for cars proceeding north. The far right lane, occupied by Best's car, was

intended both for cars turning right and for those continuing north. (R. 101). The far right lane that Best occupied ended a few hundred feet north of the intersection, and all cars using that lane were forced to merge to the left. (Tr. 123, 419). Another driver, Tom Juricic, was directly behind Best's car in the far right lane. (R. 298). The posted speed limit on this stretch of Torrence Avenue was either 40 or 45 miles per hour. (R. 67, 174, 18[illegible], 315, 339, 468-470).

Four eyewitnesses testified differently as to the events after the traffic signal turned green. Evans testified that he took off from the intersection at a normal rate of speed, intending to switch from the left lane to the right lane, because the left lane on Torrence

Avenue was bumpy and he did not like driving in it. (R. 398). Since he was having trouble with his automobile's oil pressure, Evans disengaged his clutch while waiting at the intersection for the traffic light to change and revved his engine so the oil pressure would rise. This was standard procedure in Evans' car. When he let the clutch back out, the tires "chirped", or grabbed, and the vehicle accelerated. (R. 400).

Evans testified that he moved into the right lane about three hundred feet past the intersection, and ten to twenty feet beyond the spot where the far right lane ended. (R. 418-419). Evans made this lane change to avoid the bumpy left lane. (R. 439). When Evans changed lanes, he could see Best's car in his

rear view mirror, (which by then was in front of Campbell's van). (R. 439). Evans slowed down to wait for Best and then looked into his rear view mirror again. At this point, Evans testified that he saw Best to be about "a block" behind him and that Best had been involved in an accident. (R. 402, 441). Evans immediately turned around and drove to the scene of the accident, and again returned to the scene after calling for help at a police station. (R. 441, 443-444). The collision involving Best's automobile occurred on Torrence Avenue about halfway between the intersections of 159th Street and Michigan City Road. (R. 422). Evans had not been racing with Best and had not attempted to prevent Best's car from overtaking his own. (R.

436). Evans did not know what had caused the accident. (R. 402).

Seventeen year old Diana Dougall was one of Michael Evans' passengers on the night in question. Dougall testified that when the light changed at 159th Street, Evans' tires squealed and the automobile accelerated enough so that she was pushed back in her seat a little bit. (R. 159). There had been no conversation between Evans' and Best's cars at the interesection. (R. 176). Evans pulled ahead of Best, at a speed which Dougall estimated to be approximately 55 miles per hour. (R. 163, 177). After leaving the intersection, Dougall no longer saw Best's vehicle; it was nowhere near Evans' car. (R. 169, 177). Evans slowed down approximately halfway between

159th Street on Michigan City Road, a stretch of Torrence Avenue having no street lights. (R. 163, 166). "A little while after" Evans slowed down, a matter of seconds at least, Dougall heard a loud crash from behind. (R. 163, 173). She turned around and saw that Best's automobile had been involved in an accident. (R. 164). Dougall did not know what, if anything, had caused Best's car to lose control. (R. 172).

Catherine Campbell, the twenty-seven year old driver of the van, testified that Evans' and Best's vehicles were inching forward before the traffic light turned green. (R. 105). She did not see or hear any communication between the two cars. (R. 123). She also did not hear any motors revving or, when the light

turned green, any tires squealing, although both vehicles were capable of spinning their tires. (R. 145-146). After the light changed, Evans and Best started out at a rate of speed which Campbell estimated to be 65 to 70 miles per hour. (R. 106, 109). Campbell then "backed off" because Best's car, in the far right lane, was merging into Campbell's lane. (R. 107). The cars driven by Evans and Best continued to drive side by side. (R. 109). Campbell did not notice any weaving or improper driving on the part of these cars other than their high rate of speed. (R. 147). There was no other northbound traffic. (R. 134). Since it was dark, all Campbell could see were the taillights of these two cars. (R. 109).

Further down Torrence Avenue, it appeared to her as if Evans' car's taillights went into the right lane in front of Best's car's taillights; after that Campbell could only see one set of taillights. (R. 110). The cars were half a mile from her when the lane change occurred, and she could not tell how far apart the cars were from each other; the distance could have been one car length or five. (R. 126, 132, 134). After that, Campbell paid no more attention to the taillights. (R. 127). When she arrived "about where the taillights went into one lane," she observed smoke and the aftermath of the accident. (R. 111). Among the particular things she noticed was smoke coming from under the hood of Best's car. (R. 111-112). Catherine

Campbell's late husband, formerly a professional automobile racer, had died in an automobile accident. (R. 100, 137). After testifying about this death, she became so emotionally distraught that the court called a recess. (R. 138).

Tom Juricic, the seventeen year old driver of the car that was behind John Best's automobile at the intersection testified that he began making a right turn after the traffic light changed and Best's car moved forward. (R. 300). Juricic noticed no unusual or inappropriate acceleration on the part of Best's automobile. (R. 300). Upon hearing a "chirping", or very quick squeaking of tires, he looked back at the intersection. (R. 301). Best's car and Campbell's van were side by side in the

intersection, and Michael Evan's car was in front of them by a full car length. (R. 302, 313). Juricic did not see what happened to the cars past the intersection. (R. 310). Regarding the lane conditions near the intersection, Juricic said that both the left and far right lane had a lot of loose rocks, and the best lane to drive in was the center lane, which eventually became the right lane of northbound Torrence Avenue. (R. 316).

Calumet City Police Officer Peter Miller described the scene of the accident. Sherry Kasee's automobile was facing west across the inside southbound lane with heavy front end damage. (R. 34). Best's car was facing southbound in the outside lane with heavy rear and side

damage. (R. 35). The impact between these two cars had occurred on the inside southbound lane. (R. 85). Two other vehicles, a Chrysler and a Ford, were less extensively damaged. (R. 35). George Zorich, the driver of the Chrysler, testified that this damage had occurred when Best's automobile came from the northbound lanes and struck Zorich's car after first colliding with Kasee's; the driver of the Ford then bumped Zorich from behind. (R. 184). Officer Miller also described the stretch of Torrence Avenue between 159th Street and Michigan City Road as being very dark, with forest preserve land on either side, and being "a little bumpy". (R. 36, 42, 73). Zorich concurred that the road surface was rocky and full of gravel and dirt. (R. 195).

Calumet City Police Officer Leonard Kieltyka testified that the length of the skid marks indicated that Best's car had been travelling between 45 and 54 miles per hour, but that the vehicle must have been going faster because it did not stop on its own. (R. 380). Looking at pictures of Torrence Avenue near the scene of the accident, he was able to point out cracks in the left northbound lane which were bumpy and choppy, and he stated that the right lane seemed to be in better condition than the left. (R. 357, 359, 384).

The autopsy reports showed that neither Ronald Gibbs nor Patricia Koerner, the two victims who were passengers in Best's automobile, had alcohol in their blood. (R. 212-213). Michael

Evans testified that none of the teenagers had drank alcohol or used drugs on the evening of the accident. (R. 442). The third victim, Sherry Kasee, had a blood alcohol concentration of 0.161. (R. 213).

At the close of the State's evidence, the defendants moved for directed verdicts which were denied by the Court. (R. 291). The court found Michael Evans and John Best guilty of reckless homicide,stating that it believed Campbell's estimate of the speed of the automobiles rather than Dougall's. (R. 516). The court inferred "from the cloud of smoke", which it said both Dougall and Campbell had described, that Evans had blocked the forward progress of Best's automobile, causing Best to take evasive action in

order to avoid hitting Evans' car. (R. 516-517). Thus, the court concluded, the speed and manner of Evans' and Best's driving caused the accident. (R. 517-518).

Betwen trial and sentencing, Evans' counsel filed and argued a motion for reconsideration on the ground that the evidence had been insufficient to support the court's findings. (R. 680, Supp. R. 2). After hearing counsel's argument, the court stated, "your contention would be true and would be applicable if all of the people who [had] testified, stood on the same par or on the [same] level of credibility." (Supp. R. 19). The court then denied the motion. (Supp. R. 19).

Finally, in denying Evans' motion for a new trial, the court indicated that

it had "great difficulty" with the testimony of Michael Evans. (R. 533). In particular, the court indicated its disbelief of Evans' testimony regarding the procedure he followed in response to his car's oil pressure problems. (R. 534). The court also found that "the testimony as given by Mrs. Campbell tells the position of the vehicles more truthfully, more accurately, than as told by Mr. Evans." (R. 535). In denying the motion, the court concluded, "[I]t's only by virtue of the circumstances that Evans and Best left [the intersection] at the same time that the tragedy occurred." (R. 536).

At the sentencing hearing, the State presented the testimony of Donald Koerner, the father of one of the

accident victims in aggravation. (R. 538). Koerner said that he saw Michael Evans driving erratically at about 5:00 p.m. on the day the trial ended. (R. 540-544). By "erratically", Koerner was referring to Evans' speed of approximately twenty-five miles per hour in approaching the driveway of Rhoda Haney, who lived across the street from Koerner. (R. 548, 550). Koerner further testified that Evans first skidded into the grass along the fence, then had to back up in order to pull into the Haney's driveway. (R. 545-546). Koerner said that a call to the police was made from his house because of Evans' driving and that Evans was escorted from the area by the police. (R. 546, 549). Mr. Koerner said that he had seen Evans drive

"erratically" on other occasions. (R. 549). He also testified that, "I'm very angry, like any father who has lost a daughter." (R. 552).

Michael Evans' girlfriend Rhonda Haney explained the incident which had occurred in front of her house. (R. 598). She and Evans had driven to her house, gone inside, come back out, and started to back Evans' car out of the driveway. (R. 598). Several members of Ronald Gibbs' family (Gibbs was killed in Best's car) approached them, and Gibb's brother threatened to kill Evans. (R. 598-599). Evans ran into Haney's house, and Haney's mother called the police, who came and escorted Evans safely out of the area. (R. 599).

Michael Evans' career counselor at Thornton Fractional North High School testified on his behalf in mitigation. She described Evans as "more than cooperative", a person who worked hard and tried hard. (R. 594). His grades were a little above average and had improved after his enrollment in a vocational program. (R. 593). Evans was enrolled in the auto body shop, which was separate from the auto mechanics school and which concentrated on fender and body repair. (R. 595-596).

James Evans, Michael's father, testified that his son had never had disciplinary problems or problems with the police. (R. 602). Michael Evans' presentence investigation report revealed that he had no prior juvenile or adult criminal record. (R. 695-599).

The trial court revoked Michael Evans' driver's license and sentenced him to thirty months probation, with the condition that the first six months be served in the Cook County Department of Corrections and the final ninety days be served with weekends in jail. (R. 621-624). The court imposed the conditions of incarceration because, in its view, to do otherwise would "shockingly diminish the severity of the offenses." (R. 623). John Best's Illinois driving privileges were revoked and he was sentenced to thirty months probation, the first six months consisting of periodic imprisonment. (R. 624). The court gave Best the option of serving his periodic imprisonment in the Lake County, Indiana, jail if he could arrange it. (R. 627).

The court based the disparity in the sentencing on its belief that "there is a greater degree of culpability here in the driving of Evans as opposed to the driving of Best." (R. 635). Before the proceedings ended, the trial court set an appeal bond for Michael Evans. (R. 631).

Evans filed a timely appeal, and the Appellate Court of Illinois, First Judicial District, affirmed the conviction of reckless homicide but remanded the case for resentencing. The court held that the trial court erred in sentencing Evans to six months incarceration in addition to the term of periodic imprisonment. The Unified Code of Corrections, Ill. Rev. Stat. ch. 38, par. 1005-7-1(c) (1981),specifically precluded the sentence of both six months straight time

and the ninety days periodic imprisonment as conditions of probation.

REASONS FOR GRANTING THE WRIT

I.

THE COURTS BELOW ERRED IN FINDING THE EVIDENCE SUFFICIENT TO ESTABLISH EVANS' GUILT BEYOND A REASONABLE DOUBT.

Michael Evans was convicted of reckless homicide for the deaths of three people in a fatal traffic collision which did not involve the automobile he was driving. This conviction was entered even though the State produced no evidence at trial that Evans had either driven "recklessly" as defined by law or caused the fatal accident in question. Based on this insuffiency of evidence,

the conviction of Michael Evans for reckless homicide must be reversed.

The defendant has not and does not now deny that deference is to be given to the trier of fact's determination in a matter such as this. But the Illinois courts of appeal failed in their review of this matter to apply the rule set forth by the Illinois Supreme Court that where the evidence fails to sustain the verdict, or is improbable, unsatisfactory or inconclusive, the courts have a duty to set aside a conviction. People v. Ellis, 74 Ill.2d 489, 384 N.E.2d 331, 334 (1978).

Applying the criteria set forth in Ellis to the defendant's case, the result becomes clear. Evan's conviction for reckless homicide cannot stand because

the evidence put forth by the State at trial was improbable, inconclusive, and contrary to the human experience. This was manifested by the trial court's virtually exclusive reliance on the testimony of Catherine Campbell in drawing the erroneous inference that Evans switched lanes in such a way as to cause Best to swerve into oncoming traffic. (R. 516, 517). The appellate court seems to have also adopted Ms. Campbell's testimony about the incident as accurate and conclusive. Defendant however contends that even lending all credibility to the testimony of Campbell, it is still insufficient to establish the State's case against the defendant beyond a reasonable doubt.

Catherine Campbell observed Evans and Best prior to the accident when Evans pulled alongside the left side of her van and Best pulled up on the right at the intersection of Torrence Avenue and 159th Streets. While Campbell's testimony indicated that Evans and Best started out from the intersection at a high rate of speed (R. 106), she also explicitly stated that she heard no revving of the motors by either Evans or Best's vehicle and that she did not hear the tires of either vehicle squeal. (R. 145-146). Campbell further stated that after Best switched lanes so that he was directly in front of her they continued to proceed north on Torrence in a side by side manner. (R. 107, 109). In this regard,

Campbell's testimony was the only indication that the cars were travelling side by side; all other witnesses present at trial indicated that Evans' car was well ahead of Best's at this time. (R. 177, 313, 439). This evidence lessens the likelihood that Evans was dangerously close to Best when he moved his automobile into the right lane.

Once the cars passed Campbell, she could see only the taillights of the vehicles due to the fact that it was dark out. (R. 109). When the cars were approximately one-half mile in front of Campbell, she stated that it seemed as if the taillights of Evans' car went into the right lane in front of Best's car's taillights leaving only one set visible to her. (R. 126, 110). Campbell said

she could not tell how far apart the vehicles were from each other; the distance could have either been one car length or five. (R. 132, 134). After that point, Campbell paid no more attention to the taillights. (R. 127).

Campbell's testimony must be evaluated in the context of the other testimony presented at trial, testimony to which the trial and appellate courts seem to have given little consideration. Tom Juricic, the driver directly behind Best at the traffic light, stated that he noticed no unusual or inappropraite acceleration by Best's car. (R. 300). Diana Dougall, a passenger in Evans' car, testified that upon pulling away from the light, Evans went ahead of Best, and Dougall did not see Best's car again un-

til the accident because Best's car was not near. (R. 163, 169, 177). Dougall only became aware of the accident involving Best's car when she heard a crash and turned around to look. (R. 164, 173). Dougall did not have any knowledge of what caused Best to lose control of his automobile. (R. 172). The testimony of defendant corroborated that of Dougall in that he stated he changed lanes to avoid a bumpy stretch of pavement. (R. 439). As defendant changed lanes, he saw Best in his rear view mirror, five or six car lengths behind. (R. 439). Due to the distance between the vehicles, defendant's lane change neither cut Best off nor caused him to take evasive action. To surmise otherwise is pure conjecture drawn only from the testimony of

one witness, half a mile behind the cars of Evans and Best, that two sets of tail-lights became one. In no way can testimony of this nature be sufficient to establish the guilt of the defendant beyond a reasonable doubt.

The evidence presented at trial is also contrary to human experience because had Evans, who was driving in the left lane, actually cut off Best (driving in the right lane), Best in an all likelihood would have veered to the right and gone off the shoulder of the road. To have veered left would only have brought Best closer to the danger that Evans allegedly had subjected him to by switching lanes too close to Best's vehicle.

The inference drawn by the trial court based on the testimony of Campbell

and Dougall was unfounded and improbable. In the absence of such inference, the evidence offered was insufficient to prove either that Evans was driving in a reckless manner or that his actions caused the deaths of the three victims. In the absence of any evidence that Evans actually did make an improper lane change, the hypothesis that he caused the accident was no more likely than several other innocent hypotheses. Where a defendant has been charged with reckless homicide, as with all other criminal cases, if the accident may be attributable to either an innocent or a criminal cause, the innocent hypothesis must be adopted. People v. Hawn, 99 Ill. App.3d 334, 425 N.E.2d 1024, 1028 (1st Dist. 1981); People v. Wolter, 78 Ill. App.3d

32, 396 N.E.2d 1102, 1107 (1st Dist. 1979). In the instant case, based on the evidence introduced at trial, it is no more likely that Evans caused Best to swerve than it is that Best swerved to avoid an animal or obstacle in the road or lost control because of a mechanical malfunction, all of which were advanced as non-criminal hypotheses by defense counsel. (R. 683-684).

Of all the conduct by defendant testified to at trial, the only aspect which was even arguably improper was the speed at which he was travelling. It is well settled however that reckless conduct cannot be proved conclusively by a showing of excessive speed alone. People v. Potter, 5 Ill.2d 365, 125 N.E.2d 510, 513 (1955); People v. Parr, 133 Ill.

App.2d 82, 272 N.E.2d 712, 175 (1st Dist. 1971). Only when the act of speeding is combined with other actions or circumstances indicating a conscious disregard of a substantal risk of death or bodily harm to others does reckless driving occur. Various types of conduct which would fall into this category are speeding combined with the execution of several reckless lane changes, the cutting off of other cars, and the failure to reduce speed while approaching a standing vehicle waiting to make a left turn off on a road with heavy traffic, People v. Ziegler, 78 Ill. App.3d 490, 396 N.E.2d 1160, 1165-1166 (1st Dist. 1979); speeding while intoxicated, People v. Bonzi, 65 Ill. App.3d 927, 382 N.E.2d 1300, 1303 (2d Dist. 1978); and speeding

through a residential area, near a school zone, at 4:00 p.m. with children playing on both sides of the street. People v. Luttmer, 48 Ill. App.3d 303, 362 N.E.2d 1093, 1094 (2d Dist. 1977).

The Appellate Court correctly noted that excessive speed alone is not always sufficient to sustain a conviction for reckless homicide. It erred however in concluding that there were other circumstances present which indicated a conscious disregard of a substantial risk likely to cause death or great bodily harm to others. The "other circumstances" referred to by the appellate court was the trial court's "perfectly logical and proper" deduction that Evans forced Best to take evasive action. However, since the testimony at trial pro-

vided no factual foundation from which this deduction could be inferred, the appellate court erred in finding that there was sufficient evidence to establish the guilt of the defendant.

By allowing a conviction for reckless homicide to be entered against the defendant, where the State failed to prove the guilt of defendant beyond a reasonable doubt in failing to show that he either drove recklessly as defined by law or that he caused the fatal accident, serious constitutional issues are raised. Due process requires that a presumption of innocence must prevail, unless each element of the offense is proved beyond a reasonable doubt. People v. Biers, 41 Ill. App.3d 576, 353 N.E.2d 389, 393 (3d Dist. 1976). Due process

also requires proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. U.S. v. Read, 658 F.2d 1225, 1332 (7th Cir. 1981). As the testimony of the witnesses at trial clearly indicated, the factual cause of the accident is still unknown. Under the laws of Illinois, a reckless homicide conviction must include the showing of the driving of a motor vehicle as the cause of death. Ill. Rev. Stat. ch. 38, §9-3 (a) (1981). In the case at bar, the State clearly failed to prove that Evans' driving car was the cause of death of the three victims. Additionally, where the commission of a crime is purportedly proven by circumstantial evidence, as in the instant case, "the guilt of the accused must be so thoroughly established

as to exclude every reasonable hypothesis of his innocence." People v. Wolter, 78 Ill. App.3d 32, 396 N.E.2d 1102, 1006 (1st Dist. 1979). In the case at bar, the State failed to establish that Best did not lose control of his car for reasons other than the alleged "cutting off" of Best by Evans. Best could just as well have swerved to avoid an animal, among many other logical explanations, none of which was discounted or refuted by the State.

This court must bear in mind that the presumption of innocence must prevail until the accused is proven guilty under the established methods of procedure. The lower courts have failed to do this thus denying the defendant's right to due process under the law. People v.

Collins, 85 Ill. App.3d 1056, 407 N.E.2d 871, 873 (1st Dist. 1980).

The trial and appellate courts below have disregarded facts which establish that Michael Evans was not proven guilty beyond a reasonable doubt. In overlooking these facts the decisions below have left open for resolution some serious constitutional questions which warrant further review. For these reasons, this Court should grant this petition for a writ of certiorari.

II.

THE APPELLATE COURTS ERRED IN FAILING TO EXERCISE THEIR POWER TO REDUCE THE EXCESSIVE SENTENCE IMPOSED BY THE TRIAL COURT.

As a result of his conviction for reckless homicide, Michael Evans was sentenced to serve a thirty month probationary period by the trial court. This is the maximum probationary period allowed by law for this offense. While the trial court has discretion in imposing sentence on a convicted defendant, the trial court in the case at bar abused its discretion by requiring Evans to serve the first six months of this probationary period in Cook County Jail as well as the weekends of the last three months. The record clearly shows that the stated goals of protecting the public while attempting to rehabilitate the defendant cannot be facilitated in any manner by imposing the imprisonment upon him ordered by the trial court. The courts

below therefore erred in not modifying Evans' probation so as to eliminate these two conditions.

Courts of review are empowered to reduce sentences. Ill. Rev. Stat., ch. 110A, §615 (b)(4) (1982) (Illinois Supreme Court Rule 615(b)(4)). In fact, the court must overturn a sentence where, as here, the trial court abused its discretion. People v. LaPointe, 88 Ill.2d 482, 431 N.E.2d 344, 348 (1982).

According to People v. Bryant, 24 Ill. App.3d 1014, 322 N.E.2d 233 (2d Dist. 1975), the sentencing court must give consideration to three factors: (1) the rehabilitative effect on the defendant; (2) the necessity to protect society from the defendant; (3) the deterrent effect of the sentence. As can

be seen by the imposition of a sentence of probation for the statutory maximum period of time along with a requirement of imprisonment for a set period of straight time and a period of periodic imprisonment, the terms of the sentence are inconsistent with the stated sentencing objectives and constitute an abuse of the court's discretion.

Apparently, the trial court drew the conclusion from testimony in aggravation by Donald Koerner that the defendant, Michael Evans, is without remorse. The trial court erred in giving such great weight to Koerner's testimony because of his inherent interest in the court's decision and the contradictory relating of the events by Rhonda Haney. (R. 598-5-99). To reach the conclusion of the

trial court as to defendant's remorse is unwarranted and unfair. Evans' conduct immediately after the collision was not indicative of a lack of remorse. Rather, Evans' conduct was motivated by a sincere concern for the four friends riding in Best's car. Immediately upon becoming aware of the accident, Evans turned around and drove to the scene of the accident. Evans then left the scene to call for help at a police station after which he again returned to the scene.

The defendant cannot and does not dent, nor the anguish experienced by the families of the deceased. The fact remains however that the imposition of such a severe sentence upon the defendant will not relieve either. Defendant does not wish to deprecate the seriousness of the

offense, but surely the maximum period of probation for the offense of reckless homicide as was given defendant was sufficient.

In other cases in which the defendant's potential for rehabilitation was great and where the defendant's incarceration was not required to protect the public, the appellate courts have eliminated probationary conditions of imprisonment and periodic imprisonment from the offender's sentence. People v. Krebel, 130 Ill. App.2d 815, 264 N.E.2d 279 (5th Dist. 1970); People v. Bryant, 24 Ill. App.3d 1014, 322 N.E.2d 233 (2d Dist. 1975). As in those cases, incarceration is not required here in light of Michael Evans' unblemished prior record and the extreme unlikelihood that he will

commit other offenses in the future. Evans' potential for rehabilitation is great. He has no prior criminal background, and the offense of reckless homicide is by definition unintentional. It is obvious from the presentence investigation and the sentencing hearing that Evans comes from a close-knit and supportive family. His past performance in school has been shown as cooperative and involving great efforts, as the testimony of his high school career counselor attested. As Evans' father and the presentence report described, Michael Evans has been a steady contributor to the maintenance of the Evans' family business. Any form of incarceration, either straight time or periodic, would only serve to remove Evans from the positive influences of college, work and family.

Any argument that the deterrent effect that Evans' incarceration would allegedly have on others must fail as a result of the previous two considerations. Evans received the maximum allowable probation period of thirty months for reckless homicide, a class 4 felony. Ill. Rev. Stat., ch. 38, §§9-3(b)(2), 1005-6-2(b)(2) (1981). As has already been stated, by definition, Evans had no intention of causing injury as a result of his conduct. It is also true that Evans was not solely responsible for the offense. Evans' co-defendant, John Best, was also convicted of reckless homicide, and it was Best's car, not Evan's, which was involved in the collision. A felony conviction and two and a half years of probationary supervision in a case with a

person who has as much rehabilitative potential and as little propensity to commit crimes as Michael Evans is not so light a sentence as to deprecate the seriousness of the offense or give rise to the danger that others will not be deterred from committing similar crimes.

CONCLUSION

Reasonable doubt remains as to the cause of this tragic accident; it is clear however that it has never been proven, by testimony or otherwise, why John Best's car swerved into oncoming traffic. Evan's conviction for reckless homicide cannot stand while this doubt exists, and the courts below erred in failing to recognize the insufficiency of

the evidence. For the reasons stated above, defendant, Michael Evans, respectfully submits that this Court should grant this petition for a writ of certiorari so that the standard of beyond a reasonable doubt may be restored to its full force.

Respectfully submitted,

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Attorney for Petitioner

Office - Supreme Court, U.S.
FILED
DEC 1 1984
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL EVANS,

Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

MICHAEL EVANS,	)
	)
Petitioner,	)
vs.	)
	)
	)
PEOPLE OF THE STATE OF ILLINOIS,	)
	)
Respondent.	)

APPENDIX TO THE
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT, ILL. 62706
(217) 782-2035

October 2, 1984

Mr. William J. Harte
Attorney at Law
111 W. Washington St., S#2025
Chicago, IL 60602

No. 60476 People State of Illinois, respondent, vs. Michael Evans, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today has DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Clerk of the the Appellate Court on Ocotber 23, 1984.

Second Division
May 8, 1984

Notice

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

82-2306

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
v.	)	
MICHAEL EVANS, Defendant-Appellant.	)	HONORABLE DWIGHT McKAY, JUDGE PRESIDING.

JUSTICE DOWNING delivered the opinion of the court:

Defendant, Michael Evans, appeals from his conviction after a bench trial of three counts of reckless homicide.

(Ill.Rev.Stat. 1981, ch. 38, par. 9-3(a).) The sentence imposed was 30 months probation with the special condition that defendant serve the first six months, as well as the weekends of the final 90 days, in the Cook County Department of Corrections. Defendant contends on review that he was not proved guilty beyond a reasonable doubt, and that the trial court abused its discretion in imposing the special condition of his probation.

At approximately 9:30 p.m. on March 24, 1982, Catherine Campbell was waiting in her Ford van for the traffic light to change at the intersection of 159th and Torrence Avenue in Calumet City, Illinois. Campbell's vehicle was facing north, occupying the east-center lane of

northbound Torrence Avenue. The part of Torrence Avenue at which she was stopped, immediately south of the intersection, consists of four lanes. There is a lane for turning left onto 159th Street so as to proceed west; there are two center lanes for continuing north on Torrence Avenue; and there is a fourth lane for either turning right onto 159th Street so as to proceed east, or for continuing north and eventually merging with the east-center lane of Torrence Avenue.

While Campbell waited for the traffic light to turn green, she noticed a blue Plymouth automobile pull up immediately next to her in the west-center, northbound lane of Torrence Avenue. This car, containing four people, was being driven by defendant.

At that same time, Campbell observed a white Plymouth automobile pull up immediately next to her on the other side of her van, occupying what was the fourth or far east lane of northbound Torrence Avenue. This vehicle, also containing four people, was being driven by the codefendant in the trial below, John Best. Just before the traffic signal changed green, Campbell noticed that both cars on each side of her were inching forward to a point beyond the painted traffic line delineating the southern boundary of the intersection. As soon as the light turned green, the vehicles driven by defendant and Best accelerated at a high rate of speed. Campbell accelerated at a slower rate of speed but, within seconds, she had to

"back-off" since Best immediately began to merge into the east-center lane as he drove through the intersection heading north.

Campbell observed the two cars proceed north up Torrence Avenue, side-by-side, toward Michigan City Road.[1] The particular stretch of road in which defendant and Best were driving that night was asphalt-paved and "a little bumpy." The area itself was characterized as very dark at the time in question. According to two Calumet City police officers, on March 24, 1982 the posted speed limit along that portion of Torrence Avenue was either 40 or 45 miles

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[1]Michigan City Road transects Torrence Avenue at a point approximately one mile north of 159th Street.

per hour. Campbell estimated that the speeds of the two cars driving ahead of her were between 65 and 70 miles per hour; whereas, Diane Dougall, a passenger in defendant's car, estimated that defendant's speed reached "55, or maybe more."

Since it was night, Campbell eventually lost sight of both vehicles except for their taillights. Soon thereafter, by viewing the position of the respective taillights of each car less than one-half of a mile away, she noticed that defendant's vehicle veered over into the lane occupied by Best's car. About three or four seconds later, as Campbell arrived "to abouts where the tail lights [sic] went into one lane," she observed Best's car smoking as it

appeared to be hooked to the green car in the southbound lanes of Torrence Avenue, approximately one-half mile north of 159th Street.

George Zorich was driving south on Torrence Avenue at approximately 9:30 p.m. on March 24, 1982. At some point south of Michigan City Road, he saw Best's car come across from the northbound lanes of Torrence Avenue directly into the southbound lanes and collide with a blue Chevrolet, being driven by Sherry Kassee, as it was proceeding south approximately four car lengths in front of Zorich. Following the collision with Kassee's car, Best's automobile became airborne and struck Zorich's vehicle on the hood. Another car, heading south on Torrence Avenue,

then collided with Zorich's vehicle from behind.

Officer Peter Miller of the Calumet City police department was dispatched to the scene of the accident that night. Upon his arrival, he observed that Kassee's car, which faced west across the innermost southbound lane of Torrence Avenue, had very heavy rear-end damage. He then saw that Best's vehicle, which faced south in the outermost southbound lane of Torrence Avenue, had very heavy rear-end and right side damage. The car left skid marks, measuring 150 feet in length, which extended across the median from the northbound lanes into the southbound lanes of Torrence Avenue. As Officer Miller approached Best's vehicle he observed the body of Patricia Koerner,

who had been riding as a passenger in the car, pinned in the back seat. The officer thereafter found the body of Ronald Gibbs, another passenger in the Best vehicle, lying in a wooded area nearby. Sherry Kassee also died as a result of the injuries sustained when her car was struck by Best's vehicle.

An April 1982 grand jury charged defendant and John Best each with three counts of reckless homicide. Following a joint bench trial, the trial court found both offenders guilty as charged. Defendant's culpability was premised on the court's belief that "[defendant] blocked the progress forward of the Best vehicle *** [and] that Best had to take evasive action of some kind." At the sentencing hearing, following arguments

presented in aggravation and mitigation, the trial judge sentenced codefendent Best to a term of 30 months probation under the jurisdiction of the Adult Probation Department of Cook County. A special condition of periodic imprisonment was imposed with the option of serving such term in the Lake County, Indiana jail if it could be arranged.[2]

Regarding defendant, the court first ordered him to surrender his driver's license so that it could be forwarded to

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[2]The exact length of Best's incarceration is uncertain since page 625 of the record is missing and the half-sheet incorporated into this record only refers to the sentencing order entered against defendant. The trial court indicated that it could possibly order revocation of Best's Illinois driving privileges; however, due to the incomplete transcript of proceedings, it is not clear if the judge's observation was carried out.

the Illinois Secretary of State for revocation. Defendant was then ordered to serve 30 months probation under the jurisdiction of the Adult Probation Department of Cook County. As a special condition, defendant was further ordered to serve the first six months, as well as the weekends of the final 90 days, of the probation period in the Cook County Department of Corrections. From the orders of conviction and sentence, defendant now appeals.

I.

Initially, defendant argues that the evidence adduced at the instant trial failed to establish his guilt beyond a reasonable doubt. We disagree.

In Illinois, a person commits reckless homicide if, while driving a

motor vehicle, he unintentionally kills an individual and the acts which caused death are performed recklessly so as to create a likelihood of death or great bodily harm to some person. (Ill.Rev.Stat. 1981, ch. 38, par. 9-3(a).) "A person acts recklessly in this regard when he consciously disregards a substantial and an unjustifiable risk that his acts are such as are likely to cause death or great bodily harm to some individual and where such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in such a situation." (People v. Bonzi (2nd Dist. 1978), 65 Ill.App.3d 927, 931, 382 N.E.2d 1300, appeal denied (1979), 74 Ill.2d 587; see generally, Ill.Rev.Stat.

1981, ch. 38, par. 4-6.) Criminal liability attaches only to acts of such a reckless or wanton character as to be indicative of an utter disregard for the safety of others under circumstances likely to result in injury. (People v. Petersen (4th Dist. 1982), 110 Ill.App.3d 647, 659, 442 N.E.2d 941.) The reckless conduct must be wilful and wanton. People v. LaCombe (4th Dist. 1982), 104 Ill.App.3d 66, 72, 432 N.E.2d 672, appeal denied, 91 Ill.2d 576.

It is defendant's position that the evidence proffered by the State failed to prove that his conduct was the actual and legal cause of the offense for which he was charged and convicted. It is, of course, clear that defendant's Plymouth automobile was not directly involved in

the multi-vehicle collision which resulted in three fatalities on the night of March 24, 1982. Indeed, defendant's overt acts at the time in question were limited to operating his car at an excessive rate of speed, and veering into the east lane of northbound Torrence Avenue in front of Best's car. In order to secure defendant's reckless homicide conviction, it was therefore necessary for the State to prove that he was legally accountable for the deaths of the three motorists. One may be held accountable for the acts of another without having actively participated in the overt act. (People v. Ray (5th Dist. 1979), 80 Ill.App.3d 151, 156, 399 N.E.2d 977, appeal denied (1980), 81 Ill.2d 586.) We view the present record

as adequate to support defendant's conviction under the complicity theory.

To bring an accused within the purview of the Illinois accountability statute, the prosecution must establish, beyond a reasonable doubt, that (1) either before or during the commission of an offense, (2) with the intent to promote or facilitate the commission of an offense, (3) the defendant solicited, aided, abetted or attempted to aid another person in the planning or commission of an offense. Ill.Rev.Stat. 1981, ch. 38, par. 5-2(c); People v. Underwood (1st Dist. 1982), 108 Ill.App.3d 846, 851, 439 N.E.2d 1080, appeal denied, 91 Ill.2d 579.

Regarding the case at bar, the evidence clearly showed that on the night

of March 24, 1982, defendant and John Best, two young drivers, engaged in what is commonly known as street drag racing. Defendant attempted to refute this fact by claiming that he proceeded north on Torrence Avenue from the 159th Street intersection at a normal speed, and that his tires screeched as he accelerated because he disengaged the clutch after revving the engine in an effort to raise oil pressure. Catherine Campbell, however, testified that while she was waiting at the aforesaid intersection at the time defendant and Best pulled their cars up along each side of her, she noticed that both vehicles were inching forward to a point beyond the painted traffic line which represented the southern boundary of the intersection.

As soon as the traffic signal turned green, Campbell observed defendant and Best's vehicles accelerate at a high rate of speed. In corroboration, Diane Dougall, who was seated in the rear of defendant's car that night testified that defendant's acceleration up Torrence Avenue in the direction of Michigan City Road caused her to be pushed back into her seat.

Although the posted speed limit on the relevant stretch of road was either 40 or 45 miles per hours, Campbell, who had for three years assisted her husband, a professional auto racer, estimated that the speed of the two cars driving ahead of her on the dark, bumpy road was between 65 and 70 miles per hour. It was Dougall's estimation that defendant's

vehicle reached a speed of "55, maybe more."

We find that this testimonial evidence established, without question, that defendant was one of two puerile young men bent on an illegal act which was certainly reckless and dangerous in character and which would require the use of force, albeit mechanical, that could very well result in the unlawful taking of a human life. As such, we are of the opinion that defendant was legally accountable for the deaths of Patricia Koerner, Sherry Kassee and Ronald Gibbs.

Defendant correctly points out that excessive speed, by itself, is not always sufficient to sustain a conviction for reckless homicide. (See, People v. Ziegler (1st Dist. 1979), 78 Ill.App.3d

490, 496, 396 N.E.2d 1160, appeal denied (1980), 79 Ill.2d 629.) "However, a charge of reckless homicide may be justified by a combination of excessive speed and other circumstances which would indicate a conscious disregard of a substantial risk likely to cause death or great bodily harm to others, and the circumstances are such that a reasonable person would act differently under the same situation." Bonzi, 65 Ill.App.3d at 931-32.

Here, the indicium of conscious disregard of substantial risk was defendant's act of maneuvering his motor vehicle as he raced north along Torrence Avenue toward Michigan City Road. Based upon the testimony of Campbell and Dougall, the trial court reasonably

inferred that when defendant veered over into the east lane of northbound Torrence Avenue, he changed lanes in such a reckless and dangerous manner so as to cut off Best's automobile. It was thus perfectly logical and proper for the court to deduce that Best was forced to take the evasive action which resulted in the tragic vehicular collision.

We will not substitute our judgment for that of the trial court on questions involving witness credibility and evidentiary inferences, for the law commits to the trier of fact the determination of such issues. (People v. Akis (1976), 63 Ill.2d 296, 298, 374 N.E.2d 73; People v. Ahern (1st Dist. 1983), 119 Ill.App.3d 532, 536, 456 N.E.2d 852.) "[T]hat determination will

not be reversed unless the evidence is so improbable as to create a reasonable doubt of defendant's guilt [citation]." People v. Davis (1983), 95 Ill.2d 1, 27, 447 N.E.2d 353.

The defendant's right to drive carried with it the correlative duty to refrain from reckless or wanton driving which utterly disregarded the safety of others. The defendant's driving certainly did not reach the aforesaid standard. In light of defendant's utter disregard for the lives of other motorists, the lives of his three passengers and his own life as well, we conclude that the evidence adduced at the instant trial was more than sufficient to establish defendant's legal accountability for the three senseless

fatalities. Thus the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt.

II.

The next issue for resolution concerns the propriety of that part of the trial court's sentencing order imposing the special condition that defendant serve the first six months, as well as the weekends of the final 90 days, of his probationary period in the Cook County Department of Corrections.

A.

Defendant contends that the special condition of his probation was not warranted in light of mitigative circumstances.

Our supreme court has firmly established that the detemination of a

sentence is a matter of judicial discretion and that, absent an abuse of this discretion, the sentence imposed by the trial judge may not be altered upon review. (People v. Willingham (1982), 89 Ill.2d 352, 364, 432 N.E.2d 861; People v. Cox (1980), 82 Ill.2d 268, 275, 412 N.E.2d 541.) It is not our function to serve as a sentencing court; thus, "[a] sentence imposed within the statutory limits will not be reduced merely because we, as a reviewing court, might have imposed a different punishment." People v. Holloway (1st Dist. 1983), 119 Ill.App.3d 1014, 1022, 457 N.E.2d 466, citing People v. Perruquet (1977), 68 Ill.2d 149, 156, 368 N.E.2d 882.

Reckless homicide is a Class 4 felony. (Ill.Rev.Stat. 1981, ch. 38,

par. 9-3(b)(2).) The permissible sentence ranges from a one to three-year term of inprisonment. (Ill.Rev.Stat. 1981, ch. 38, par. 1005-8-1(a)(7).) The maximum probationary period for the commission of a Class 4 felony is 30 months. (Ill.Rev.Stat. 1981, ch. 38, par 1005-6-2(b)(2).) An offender, as a condition of his probation, can be sentenced to a term of incarceration not to exceed six months. (Ill.Rev.Stat. 1981, ch. 38, par. 1005-6-3(d).) Consequently, it is clear that the trial judge did not transcend the prescribed statutory framework by requiring that defendant be imprisoned during the first six months of his probationary period.

It is suggested that the lower court was unconcerned with defendant's

rehabilitative potential in that it "arbitrarily" imposed the special condition of his probation. To the contrary, however, we discern careful consideration by the court of defendant's personal traits, his age, his educational as well as employment background, his family situation, and his lack of a juvenile delinquency record. Indeed, the imposition of the probationary period itself, as opposed to a sentence of a one to three-year term of incarceration, is clearly indicative of the court's regard as "to the nature and circumstance of the offense, and to the history, character and condition of the offender***." (Ill.Rev.Stat. 1981, ch. 38, par. 1005-6-1(a).) Further, the sentencing judge provided defendant's trial lawyer

with ample opportunity, which counsel fully utilized, for argument in mitigation. Although the record evinces several significant mitigative circumstances, the cumulative import of such attendant conditions is in no way conclusive. This is because "rehabilitation and the seriousness of the offense are to be accorded equal weight in fixing punishment, and the prime responsibility for striking the proper balance between the two factors rests with the trial court." People v. Crosser (2nd Dist. 1983), 117 Ill.App.3d 24, 32, 452 N.E.2d 857.

Defendant's citation of error regarding the disparity between his sentence and codefendant Best's sentence

must similarly fail.[3] "[M]ere disparity in sentences, without more, does not warrant reduction of the greater sentence by a reviewing court." (People v. Mick (5th Dist. 1980), 86 Ill.App.3d 1022, 1028, 408 N.E.2d 1079.) Moreover, in Illinois, a trial court's determination of the punishment to be imposed involves consideration of the subjective circumstances presented in each individual case, i.e., the defendant's mentality and general moral character, his abnormal or subnormal tendencies, and

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[3]It is defendant's averment that, notwithstanding the incomplete transcript of record before this court, Best's sentence of probation was conditioned only on periodic imprisonment, as opposed to straight-time incarceration, during the first six months of his 30-month probationary period.

his natural inclination or aversion to commit crime. People v. Dukett (1974), 56 Ill.2d 432, 452, 308 N.E.2d 590, cert. denied, 419 U.S. 965; People v. Reese (1st Dist. 1984), 121 Ill.App.3d 977, 989, ___ N.E.2d ___.

At defendant's sentencing hearing, the State proffered evidence that since August 18, 1982, the date on which judgment of conviction was entered, defendant hd been observed speeding and driving erratically through a residential area on a number of occasions. In addition to this aggravating factor indicative of a lack of remorse, the trial court also considered "that there is a greater degree of culpability here in the driving of Evans as opposed to the driving of Best. And it was my finding,

and still is, that the manner in which Evans drove compelled Best to do whatever he had to do to avoid a collision with Evans."

In essence, our review of the record reveals that, taken separately, the two incarceration requirements of defendant's special probationary condition were each based upon the unique objective and subjective circumstances presented in this case. Defendant argues that such imprisonment will have a disruptive effect on his lifestyle; we feel it unnecessary to depict the disruption, if not sheer anguish, that has pervaded the lifestyles of the victims' families since the night of March 24, 1982.

B.

The final claim of error for review concerns defendant's contention that section 1005-7-1(c) of the Unified Code of Corrections (Ill.Rev.Stat. 1981, ch. 38, par. 1005-7-1(c)) precludes six months incarceration in conjunction with a term of periodic imprisonment.

Section 1005-7-1(c) provides in pertinent part that: "The court shall not impose a sentence of periodic imprisonment if it imposes a sentence of imprisonment upon the defendant in excess of 30 days." The sentence here is six months straight time as a condition of defendant's probation was, as previously stated, permissible under the sentencing provisions of the Unified Code of Corrections (Ill.Rev.Stat. 1981, ch. 38, par. 1005-6-3(d).) Alternatively, the

trial court could have ordered the special condition that defendant serve up to 18 months periodic imprisonment. (Ill.Rev.Stat. 1981, ch. 38, par. 1005-7-1(d).) However, as the State concedes, "[i]f straight time of more than 30 days as a condition of probation is imposed, [the court] cannot impose in addition any periodic imprisonment." People v. McMullen (4th Dist. 1980), 88 Ill.App.3d 611, 615, 410 N.E.2d 1174.

The trial court could not impose six months straight time together with 90 days periodic imprisonment. We believe the trial court should make the determination of which special condition should be imposed. We therefore vacate the special condition of defendant's

probation and remand this cause for resentencing within the prescribed statutory framework.

III.

Under the authority of Ill.Rev.Stat. 1983, ch. 53, par. 8 and People v. Nicholls (1978), 71 Ill.2d 166, 374 N.E.2d 194, we assess defendant $50 in costs for the State's defense of this appeal, and hereby incorporate it as part of this judgment. We deny the State's request for an additional $25 for oral argument. This denial is predicated on our interpretations of the per diem provision of the statute ("For each day actually employed in the trial of a case, $25") as referring to an actual trial in the circuit court, not to an oral argument on appeal.

For the reasons set out herein, the judgment of this conviction is affirmed, the sentending order is vacated in part, and this cause is remanded to the Circuit Court of Cook County for resentencing.

JUDGEMENT AFFIRMED; SENTENCE VACATED IN PART: CAUSE REMANDED FOR RESENTENCING.

STAMOS and PERLIN, JJ., concur.

COUNTY OF COOK

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
SIXTH MUNICIPAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS	)	
VS.	)	CASE NUMBER 82 C 3247
MICHAEL EVANS	)	

SPECIFICATIONS AND CERTICATE OF PROBATION

IT IS THIS SENTENCE AND ORDDR (sic) OF THE COURT that the above named Defendant having been adjudged guilty fo the crime of RECKLESS HOMICIDE (3 COUNTS) in the above captioned case, and further, haveing (sic) regard to the nature and circumstances of the offense, and to the history, character and condition of the above named Defendant and being of the opinion that a sentence of probation would not depreciated (sic) the seriousness of the Defendant's conduct, the above named Defendant is sentenced to

a period of probation 30 MONTHS unless terminated sooner if warranted by the conduct of the offender and the ends of justice.

The conditions of the Probation Sentence shall be as follows:

(1) The Defendant shall not violate any Criminal Statute of any jurisdiction.

(2) The Defendant shall make a report to and appear in person before the Cook County Adult Probation Department, 16501 South Kedzie Avenue, Markham, Illinois, Phone 596-8000 Ext. 576 within two (2) days of this order and at another time and place designated by the Probation Department and in person appear before the Court at such time as the Court may direct or by rule provide.

(3) The Defendant shall refrain from possessing any firearm or any other dangerous weapon.

(4) The Defendant shall permit Probation Officers to visit him at his home or elsewhere.

(5) The Defendant shall comply with the rules and regulations of the Adult Probation Department.

(6) OTHER CONDITIONS: The defendant shall serve the first six months in CCDOC; the defendant shall serve the final three months of probation in periodic imprisonment pursuant to draft order.

It is further order of this Court that records of this Probationer be maintained by the Adult Probation Department, and if a petition for revocation of this probation is file such records of this Probationer, kept in accordance with statute and this order, bearing upon the conduct of the Probationer during his probation period in compliance with 1973 Illinois Revised Statutes, Chapter 38, Section 204-4(4).

IT IS SO ORDERED //s//Dwight McKay
JUDGE

DATE 9/22/82

The Defendant acknowledges receipt of the above document setting forth specifications and conditions of the sentence of probation and understands a failure to follow these conditions could result in revocation of the probation and re-sentencing up to the maximum penalty for the crime for which he is on probation (See 1973 Illinois Revised Statutes, Chapter 38, Section 1005-6-3.

/s/Michael Evans (DEFENDANT-PROBATIONER)

415 Saginaw Ave. ADDRESS

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	Case No. 82 C 3247
	Charge: Reckless Homicide
v.	Date of Sentence: 9-22-82
MICHAEL EVANS.	First Report Date: Saturday 12-24-83
	Term of Periodic Imprisonment: Friday at 6:00 P.M. until Sunday at 6:00 A.M.

PERIODIC IMPRISONMENT ORDER

Upon a finding of guilty and a judgment of guilty, the defendant is sentenced to the term of periodic imprisonment shown above. It is further ordered that:

1. Defendant shall report to the Guard House of the Department of Corrections at 2700 South California Avenue, Chicago, Illinois at 9:00 A.M. on

the first report date shown above, unless otherwise specifically ordered below, and may remain in custody for the first 24 hours and bring a copy of this Order with him.

2. The defendant shall be assessed $12.00 room and board per day unless waived or modified by the Court.

3. The defendant may be released on the holidays designated by the Sheriff unless otherwise provided by the Court.

4. Upon reasonable grounds to believe there is a violation of this Order, or the Department of Correction regulations, or the commission of another offense, the Sheriff may hold the defendant in confinement for a court hearing on the violation up to 48 hours, unless further ordered by the Court. The Court retains the power to revoke or

modify the provisions of this periodic imprisonment.

5. Additional orders: (Court shall note conditions of confinement) (Monday through Friday with hours released, weekends only with hours of incarceration)

The defendant shall serve the last 90 days of his probation serving weekend inprisonment from Friday at 6:00 p.m. until Sunday at 6:00 a.m.

Defendant acknowledges receipt of this Order and states that he understands the conditions of his periodic imprisonment as set forth above.

/s/ Michael J. Evans
415 Saginaw Avenue
9/22/82

ENTER: /s/ Dwight McKay
JUDGE

Supreme Court, U.S.
FILED
FEB 4 1985
CLERK

NO. 84-895

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MICHAEL EVANS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Supreme Court has jurisdiction in the instant case to decide the question of sufficiency of the evidence where the decision of the Illinois trial and appellate courts below rests on the adequate and independent state ground that under Illinois law the evidence established that petitioner was proven guilty beyond a reasonable doubt.

2. Whether the United States Supreme Court has jurisdiction to review the instant case on the issue of excessiveness of sentence where there is no articulation of any constitutional infringement of petitioner's rights, where the Illinois Appellate Court's resolution of the sen-

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NO. 84-895

IN THE
SUPREME COURT OF THE UNITED STATES
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MICHAEL EVANS,

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vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE APPELLATE
COURT OF ILLINOIS, FIRST DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, affirming the petitioner's convictions on three counts of reckless homicide is reported as People v. Michael Evans, 124 Ill. App.3d 634, 464 N.E.2d 1083 (1st Dist. 1984).

JURISDICTION

In his Petition for Writ of Certiorari, petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3). He claims that because his guilt on the three charges of reckless homicide was not proven beyond a reasonable doubt at trial or on appeal and because his sentence was excessive, his right to due process under Amendment XIV to the Constitution of the United States was violated by the trial and appellate courts below. Because the determination of petitioner's guilt at the trial and appellate levels below and the determination of the sentence imposed were based on adequate and independent state grounds, the respondent believes that this Court lacks jurisdiction to decide the issues of the sufficiency of

the evidence and the excessiveness of the sentence. Moreover, because the evidence at trial clearly established petitioner's guilt beyond a reasonable doubt and because the sentence imposed fully complied with the Illinois statutory sentencing scheme, the respondent believes that the petitioner has failed to show any deprivation of his constitutional rights or any other good reason for this Court to exercise jurisdiction to review the judgment in question by granting the petition for writ of certiorari. Accordingly, the petition should be denied.

STATEMENT OF THE CASE

After a bench trial in the Circuit Court of Cook County, Illinois, the petitioner, Michael Evans, was convicted of three counts of reckless homicide. (R. 518)[1] He was sentenced to 30 months probation, with the first 6 months to be served by straight time imprisonment in the Cook County Department of Corrections and the last 90 days to be served by periodic imprisonment on weekends. (R. 623-624; R. C702-C703) The petitioner appealed from the judgment of conviction and the sentence to the Appellate Court of Illinois, First District. (R. C709)

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1 "R." designates the transcript of record of the petitioner's trial; "R. C." designates the common law record.

The Appellate Court afffirmed the petitioner's conviction but remanded the case for resentencing. His petition for leave to appeal to the Supreme Court of Illinois was denied.

The Petitioner's Trial

At petitioner's bench trial, the prosecution's evidence established that on March 24, 1982, at about 9:30 p.m., an automobile driven by co-defendant John Best collided with an automobile driven by Sherry Kasee on Torrence Avenue in Calumet City, Illinois. As a result of this collision, three people were killed: Ronald Gibbs and Patricia Koerner, passengers in Best's vehicle, and Sherry Kasee. These facts are undisputed.

The prosecution's theory of the case was that petitioner Evans and co-defendant

Best drove their respective automobiles recklessly and at excessive speeds in a manner of driving which was likely to cause the death of some individual, while engaged in a race between themselves (commonly referred to as "drag racing") on a street designated for local motor vehicle traffic in Cook County, Illinois. (R. C641-C650)

Prosecution witness Catherine Campbell testified that on March 24, 1982, at approximately 9:30 p.m., she was seated in her Ford van waiting for the traffic light to change at the intersection of 159th and Torrence Avenue in Calumet City, Illinois. Her van was facing north, occupying the east-center lane of northbound Torrence Avenue. At her location, Torrence Avenue consisted of four northbound lanes. (R. 101) The western-most lane, to the far left of Campbell, is a left hand turning lane; the lane next to Campbell on her

immediate left and the lane occupied by Campbell are the two center lanes for continuing north on Torrence Avenue; the lane next to Campbell on her immediate right is a lane used for either turing right onto 159th Street, to proceed east, or for continuing north and eventually merging with the east-center lane of Torrence Avenue. (R. 101-103)

While waiting for the traffic light to turn green, Campbell noticed a blue Plymouth automobile pull up in the lane to her immediate left, the west-center lane of northbound Torrence Avenue. This car was driven by petitioner and had three other passengers in it. (R. 103-104) At the same time, a white Plymouth automobile pulled up in the lane to Campbell's immediate right, the far east lane of northbound Torrence Avenue. (R. 103-104)

This car was driven by co-defendant Best and had three other passengers in the car, including Ronald Gibbs and Patricia Koerner. (R.157-158)

Just before the traffic signal turned green, Campbell noticed that the Plymouths on either side of her were each inching forward to a point beyond the painted traffic lane establishing the southern boundary of the intersection. (R.105) As soon as the light turned green, both cars accelerated forward at a high rate of speed. (R. 106) Campbell began to accelerate at a slower rate of speed, but soon had to "back off" because co-defendant Best immediately began to merge into her lane (east-center) as he drove through the intersection heading north. (R. 106-107)

Campbell observed the two cars speed side by side northward up Torrence Avenue at speeds which she estimated at between 65

and 70 miles per hour. (R. 109) Campbell also testified that for 3 years she had assisted her husband in his career as a professional auto racer. (R. 100)

Diane Dougall, a passenger seated behind petitioner, estimated that petitioner's car was traveling at "55, or maybe more" miles per hour. (R. 163) Dougall also testified that when petitoner accelerated from the traffic signal, she was initially scared because the tires on petitioner's car squealed and because she was pushed back into her seat by the swift acceleration. (R. 159, 163)

The stretch of Torrence Avenue upon which petitioner and co-defendant Best were drag racing was a very dark, slightly bumpy, asphalt-paved road straightaway with two lanes northbound and two lanes southbound, separated by a 2-foot-wide, 2-inch-

high solid concrete median. (R. 36, 67, 70, 72) The speed limit on that particular road was either 40 or 45 miles per hour. (R. 36, 37)

Because of the poor lighting of that road, Campbell lost sight of the two automobiles except for their taillights. (R. 109-110) Shortly thereafter, when the vehicles were less than one-half mile away, she noticed that the taillights of the vehicle which petitioner was driving veered over into the lane occupied by co-defendant Best's vehicle. (R. 110) About 3 or 4 seconds later, Campbell arrived at about where she saw the taillights merge and noticed Best's car smoking. His car appeared to be hooked to a green car in the southbound lanes of Torrence Avenue. This accident scene was located on Torrence Avenue approximately one-half mile north of 159th Street. (R. 112)

George Zorich testified that he was driving southbound on Torrence Avenue about one-half mile north of the intersection of 159th Street and Torrence Avenue at about 9:30 p.m. on March 24, 1982. (R. 182-183) At that point he observed Best's car skid across the northbound lanes into the southbound lanes of Torrence Avenue and crash into a Chevrolet driven by Sherry Kasee as she was driving southbound. (R. 183-184) After colliding with Kasee's car, Best's vehicle flew into the air and struck Zorich's vehicle on the hood. Zorich's car was then hit from behind by another southbound automobile. (R. 184)

Officer Peter Miller of the Calumet City police department testified that he was called to the scene of the above accident on the night in question. (R. 32) Upon his arrival, he noticed that Kasee's car had very heavy front-end damage. (R.

34) He also saw that Best's vehicle, which was now in the southbound lane of Torrence Avenue, had very heavy rear-end and right side damage. (R. 35) Best's car left skid marks, ending at the collision site. The skid marks measured 150 feet in length and extended across the median from the northbound lanes into the southbound lanes of Torrence Avenue. (R. 43-44)

Upon reaching Best's automobile, Officer Miller saw the body of Patricia Koerner, a passenger in Best's car, pinned againt the back seat. (R. 39, 50) Shortly thereafter, he noticed the body of Ronald Gibbs, another passenger in Best's car, lying 20 to 30 feet away in a nearby wooded area. (R. 43, 60) Sherry Kasee also died as a result of injuries sustained when her car was struck by Best's vehicle. (R. 211)

Petitioner's defense was simply that that he and co-defendant Best were not "drag racing" or recklessly driving and that Best's loss of control of his vehicle was not a result of the petitioner's maneuvering of his vehicle on the street. In explaining why his wheels "squealed or chirped" when he accelerated his automobile, petitioner stated that his oil pressure was low and that in order to raise that pressure he had to disengage his clutch and "rev" the motor. (R. 414) As he drove away from the traffic light, he "pushed in the clutch and revved the motor to bring the oil pressure up." Then he let the clutch out and the wheels "chirped." (R. 400, 414-415) According to petitioner, this was a standard procedure for his car. (R. 400)

Petitioner also explained away the testimony of Catherine Campbell concerning

her observations of the merging automobile taillights. Defendant testified that because the left northbound Torrence Avenue lane was "bumpy" and because his car had worn tires, he preferred to drive in the right northbound lane. (R. 398) So he changed lanes from the west northbound lane to the east northbound lane about a "block or so" in front of Best's car. (R. 402, 420) Immediately after he changed lanes, he looked into his rear-view mirror and saw Best's car "getting hit." (R. 420) Petitioner did not know what caused Best's accident. (R. 402)

On his behalf, petitioner presented 17-year-old Tom Juricic as a witness. (R. 296) Juricic was petitioner's classmate. (R. 302) On the evening of the incident, Juricic was seated in his automobile facing north in the far right (eastern-most) lane at the intersection of 159th and Torrence

Avenue (R. 296-300)

He observed Best's car in front of him and Campbell's van in the lane to the left of Best's car. (R. 298) After the light changed and he started to make a right turn to proceed eastbound on 159th Street, Juricic heard the chirping or squealing of tires. This noise did not come from the car immediately in front of him, i.e., Best's car. (R. 301) He then turned his head and observed petitioner's car accelerating, but he did not notice anything unusual about the acceleration. (R. 301-303)

However, Juricic did state on cross-examination that when he turned to look at where he heard the squealing, he noticed that petitioner's car was a full car length in front of the van and Best's car. (R. 313) Juricic also stated that he never saw any of the vehicles again after they passed

the far north end of the intersection because he continued to complete his right-hand turn. (R. 310, 314)

Co-defendant Best did not testify at trial.

At the close of petitioner's bench trial, the trial court found both petitioner and co-defendant Best guilty on the three charges of reckless homicide. Petitioner was sentenced to 30 months probation with two special conditions: (1) that he serve the first 6 months in the Cook County Department of Corrections, and (2) that he serve the last 90 days of the probation incarcerated only on weekends. (R.623-624) Petitioner appealed from his convictions and sentences to the Appellate Court of Illinois. (R. C709)

The Petitioner's Appeal

The Appellate Court of Illinois, First District, affirmed the petitioner's convictions but vacated and remanded for resentencing as to the special conditions portion of his probation sentence in an opinion dated May 8, 1984. (The Opinion is set out in full in the Appendix of the Petition for Writ of Certiorari, pages 2-34.) The Appellate Court ruled that the trial evidence was sufficient beyond a reasonable doubt to establish petitioner's guilt. (Appendix at 12-23) Noting that the petitioner's automobile was not directly involved in the multi-vehicle collision which caused the three deaths on March 24, 1982, the Appellate Court held that petitioner was, nevertheless, legally accountable for those deaths because the evidence clearly established that peti-

tioner and co-defendant Best did engage in a "street drag race." (Appendix at 14-17) As a result of this illegal act of drag racing, in which petitioner and co-defendant drove their automobiles in a reckless and dangerous manner, an accident ensued and the lives of three human beings were unlawfully taken. (Appendix at 19)

The Appellate Court also addressed the petitioner's contention that the special conditions of his probation involving incarceration were unjustified in light of mitigative circumstances. (Appendix at 23) The Appellate Court decided that according to the Illinois statutory sentencing scheme, the trial court could have properly sentenced petitioner to either a penitentiary sentence (a determinative term of anywhere between 1 and 3 years in the state penitentiary) or a term of probation of up to 30 months. If probation were the sen-

tence imposed (as it was here), the trial court could have imposed special conditions. The Appellate Court noted that among the conditions the trial court properly could have imposed in the instant case were either (1) a condition that up to 6 months of the probation be served as straight time in the county jail, or (2) a condition that up to 18 months of the probation be served as periodic imprisonment, or (3) that a combination of straight time in jail and periodic imprisonment, as long as the straight time did not exceed 30 days. However, the Appellate Court also found that where, as a special condition of probation, straight time imprisonment exceeding 30 days was mandated, no periodic imprisonment could be imposed. Thus, the Appellate Court concluded that the trial court could not impose straight time imprisonment of 6 months coupled with 90 days

periodic imprisonment. Accordingly, the Appellate Court vacated the special conditions of petitioner's probation and remanded the case for the trial court to determine which special condition should be imposed. (Appendix at 24-33)

From the affirmance of his convictions and part of his sentence by the Appellate Court, the petitioner sought leave to appeal to the Supreme Court of Illinois. On October 2, 1984, the Supreme Court of Illinois denied his petition for leave to appeal. (Appendix at 1)

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

THIS COURT LACKS JURISDICTION TO DECIDE THE INSTANT CASE ON THE QUESTION OF SUFFICIENCY OF THE EVIDENCE WHERE THE DECISIONS OF THE ILLINOIS TRIAL AND APPELLATE COURTS BELOW REST ON AN ADEQUATE AND INDEPENDENT STATE GROUND THAT UNDER ILLINOIS LAW THE EVIDENCE ESTABLISHED THAT PETITIONER WAS PROVEN GUILTY BEYOND A REASONABLE DOUBT.

The petitioner contends that his constitutional right to due process was violated by the trial and appellate courts below because the evidence presented at trial failed to prove beyond a reasonable doubt that he had driven recklessly or caused the fatal automobile accident on the night in question. (Petition for Writ of

Certiorari at 26)

The respondent asserts that the United States Supreme Court lacks jurisdiction to decide the issue of the sufficiency of the evidence in the instant case because the determination of petitioner's guilt at the trial and appellate levels below was based on adequate and independent state grounds. Furthermore, the evidence presented at trial clearly established petitioner's guilt beyond a reasonable doubt and the Illinois Appellate Court agreed. Accordingly, petitioner was not deprived of his constitutional right to due process and his petition for writ of certiorari must be denied.

The United States Supreme Court has long held that it will not grant certiorari to review evidence and discuss specific facts (United States v. Johnston, 268 U.S. 220, 227, 45 S.Ct. 496, 69 L.Ed.2d 925

(1925)), nor will it grant certiorari to review state court judgments that are based on adequate and independent state grounds. Herb v. Pitcairn, 324 U.S. 118, 125, 65 S.Ct. 459, 89 L.Ed. 789 (1945). Moreover, the United States Supreme Court has expressly declared that it will not review state court cases where it is not affirmatively and clearly shown that the state court decision was decided on a federal question and that that federal question was essential to the disposition of the case. Id. at 126.

In the case at bar, the decisions of the Illinois trial and appellate courts below rested on adequate and independent state grounds. It has long been held by the Illinois courts that a defendant is presumed innocent until proven guilty and he is not required to present evidence to establish his innocence. Ill. Rev. Stat.

1983, ch. 38, sec. 3-1; People v. Coulson, 13 Ill.2d 290, 295, 149 N.E.2d 96 (1958). If the defendant takes the stand, denies guilt, and offers an explanation for his actions, he does not automatically establish reasonable doubt. People v. Spagnolia, 21 Ill. 2d 455, 458, 173 N.E.2d 431 (1961). Proof of defendant's guilt does not require proof beyond any possibility of a doubt. People v. Williams, 66 Ill.2d 478, 485, 363 N.E.2d 801 (1977). In weighing the evidence the trier of fact is not required to disregard the natural inferences that flow normally from the evidence. People v. Kelly, 29 Ill.2d 53, 59, 193 N.E.2d 21 (1963).

The testimony of a single credible witness, even if it is contradicted by the accused, may be sufficient to sustain a conviction. People v. Cox, 22 Ill.2d 534, 539, 177 N.E.2d 211 (1961). A conviction

may be sustained upon circumstantial as well as direct evidence. People v. Bernette, 30 Ill.2d 359, 367, 197 N.E.2d 436 (1964). While the circumstantial evidence relied upon must not give rise to any reasonable hypotheses of innocence, the trial court is not required to search out a series of potential explanations compatible with innocence and elevate them to a status of reasonable doubt. People v. Rhodes, 85 Ill.2d 241, 249, 422 N.E.2d 605 (1981).

In a bench trial, as was the case at bar, the determination of the witnesses' credibility and the weight to be afforded their testimony is solely the function of the trial judge; and that determination will not be disturbed unless it is palpably erroneous. People v. Curry, 56 Ill.2d 162, 174, 306 N.E.2d 292 (1973). A trial judge is not obligated to believe the testimony of a defense witness over the

testimony of the prosecution's witnesses. People v. Berland, 74 Ill.2d 286, 307, 385 N.E.2d 649 (1978). The reviewing court will not set aside the trial court's determination as to the credibility of the witnesses and the resolution of conflicting evidence, unless the record establishes a reasonable doubt of guilt. People v. Clark, 30 Ill.2d 216, 219, 195 N.E.2d 631 (1964).

The evidence relied upon by the Illinois trial and appellate courts below established petitioner's guilt beyond a reasonable doubt. Contrary to petitioner's contention that the trial court relied exclusively on Catherine Campbell's testimony (Petition for Writ of Certiorari at 28), the record reveals that the trial court also relied on the testimony of Diane Dougall (one of the passengers in petitioner's car), Tom Juricic, George Zorich, and Officer Peter Miller. (R. 516-517)

In affirming petitioner's conviction, the Appellate Court cited, in particular, the testimony of Catherine Campbell and Diane Dougall. That testimony established that petitioner and co-defendant began their race at the traffic light at 159th Street and Torrence Avenue, accelerated at a high rate of speed from that intersection. Shortly thereafter, petitioner abruptly changed lanes, cutting off co-defendant, which caused the eventual accident. (Appendix at 17-18) The Appellate Court also cited petitioner's denial of the drag race accusation. (Appendix at 17) The Appellate Court stated that, based on the above testimony, it was "perfectly logical and proper for the [trial] court to deduce that [co-defendant] Best was forced to take evasive action which resulted in a tragic vehicular collision." (Appendix at 21) Lastly, the

Appellate Court held that it would not substitute its judgment for that of the trial court on questions concerning evidentiary inferences and witness credibility. (Appendix at 21)

In summary, this Court lacks jurisdiction to decide the instant case on the question of sufficiency of the evidence where the decisions of the Illinois trial and appellate courts below rested on adequate and independent state grounds. Furthermore, the evidence presented at trial clearly established petitioner's guilt of reckless homicide beyond a reasonable doubt. As a result, petitioner was not denied his constitutional right to due process. Thus, certiorari should be denied in this case.

II.

THIS COURT LACKS JURISDICTION TO REVIEW THE INSTANT CASE ON THE ISSUE OF EXCESSIVENESS OF SENTENCE WHERE THE PETITIONER FAILED TO ASSERT ANY CONSTITUTIONAL OBJECTION TO THE SENTENCE IMPOSED AND WHERE THE ILLINOIS APPELLATE COURT'S RESOLUTION OF THE SENTENCING ISSUE WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS AND FULLY COMPLIED WITH THE ILLINOIS STATUTORY SENTENCING SCHEME.

Petitioner contends that the Illinois Appellate Court erred in failing to reduce the sentence imposed by the trial court. (Petition for Writ of Certiorari at 41-43)

Respondent maintains that this Court lacks jurisdiction to review the instant case on the issue of sentencing because the petitioner fails to state any constitu-

tional objection to the sentence imposed. Jurisdiction is also absent in this case because the Appellate Court's resolution of the sentencing issue was based on adequate and independent state grounds and was in full compliance with the Illinois statutory sentencing scheme.

There is no federal question in the case at bar because petitioner failed to assert any. In claiming that the Illinois Appellate Court erred in failing to reduce the trial court's sentence, the petitioner deos not specifically state how this alleged error denies him any of his constitutional rights. There is no allegation in the Petition for Writ of Certiorari that petitioner's sentence violates his constitutional rights of due process, Eighth Amendment protection against cruel and unusual punishment, or any other constitutional provision. As stated earlier in

respondent's first argument, this Court has long held that it will not review a state court judgment that is based on adequate and independent state grounds, especially where it is not affirmatively and clearly shown that the state decision was decided on a federal question. Herb v. Pitcairn, 324 U.S. 118, 125-126, 65 S.Ct. 459, 89 L.Ed. 789 (1945); Michigan v. Long, ___ U.S. ___, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). Because there is no articulation of any violation of constitutional rights here, there is no federal question in this case. Accordingly, this Court does not have jurisdiction to decide the instant case.

In addition to the absence of a federal question, the decisions of the Illinois trial and appellate courts below were based on adequate and independent state grounds and the sentence imposed

fully complied with the Illinois statutory sentencing scheme. The Illinois Appellate Court did reduce the petitioner's sentence imposed by the trial court. The original sentence imposed was 30 months probation with the first 6 months to be served in the Cook County Department of Corrections and the last 90 days of the probation to require weekend periodic imprisonment. (Appendix at 35-41) Petitioner was convicted of three counts of reckless homicide. As the result of causing the deaths of three persons in this manner, he could have been sentenced to the Illinois State Penitentiary for a determinate term of anywhere from 1 to 3 years on each count. Instead, the trail court sentenced the petitioner to probation, subject to conditions.

On appeal, the Appellate Court of Illinois decided that according to the

Illinois statutory sentencing scheme, the trial court could have properly imposed certain special conditions of probation. Among the special conditions the trial court have imposed were : (1) a condition that up to 6 months of the probation be served as straight time in the county jail, or (2) a condition that up to 18 months of the probation be served as periodic imprisonment, or (3) that a condition of straight time combined with periodic imprisonment be ordered as special conditions of probation, but only if the straight time imposed did not exceed 30 days. The Appellate Court found that where, as a special condition of probation, straight time imprisonment exceeding 30 days was imposed, no periodic imprisonment could be imposed. The Appellate Court concluded, therefore, that the trial court improperly imposed straight time imprisonment of 6

months coupled with 90 days periodic imprisonment. Accordingly, the Appellate Court vacated the special conditions of petitioner's probation and remanded the case for the trial court to determine which of the special conditions should be imposed. (Appendix at 24-33)

In reaching its decision on this sentencing issue, the Appellate Court relied on well-established state law. The Appellate Court noted that the Illinois Supreme Court had previously held that sentencing is a matter of judicial discretion and that a reviewing court must not overturn a sentence imposed within the statutory limits unless there is a showing of abuse of that discretion. (Appendix at 23-24)

The Appellate Court also found that the two special requirements of imprisonment, taken separately, were justified

based upon "the unique objective and subjective circumstances presented in this case." (Appendix at 30) The Appellate Court noted that the trial court carefully considered the petitioner's age, background, family situation, and criminal background in fashioning its sentence for petitioner. This is especially true in light of the fact that the probationary period itself was imposed, rather than the statutorily permissible 1 to 3 year term of imprisonment for the Class 4 felony of reckless homicide. (Appendix at 26)

Lastly, in justifying petitioner's sentence, the appellate court cited the well-established principle that the rehabilitative potential of the petitioner is to be given equal weight to the seriousness of the offense in determining punishment. (Appendix at 27) Petitioner did not receive either the maximum or minimum term

of imprisonment for reckless homicide, but instead received the maximum probationary period coupled with a relatively short term of imprisonment. Considering that not one but three people were killed as a result of petitioner's conduct, his sentence cannot be considered excessive. Thus, the appellate court did not abuse its discretion in amending petitioner's sentence.

In summary, there is no federal question in this case as petitioner failed to articulate any violation of his constitutional rights. The decisions of the Illinois trial and appellate courts below were based on adequate and independent state grounds. Because of the absence of federal question and the adequacy of the state courts' decisions, the United States Supreme Court lacks jurisdiction to review the instant case. Accordingly, certiorari should be denied.

CONCLUSION

The People of the State of Illinois respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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